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Transacting Business As Jurisdictional Basis—A Survey of New York Case Law

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TRANSACTING BUSINESS AS JURISDICTIONAL BASIS—A SURVEY OF NEW YORK CASE LAW

INTRODUCTION

The New York Civil Practice Law and Rules (hereinafter referred to as CPLR) became effective on September 1, 1963. Among the newly enacted sections, CPLR section 302[1] is of singular importance,[2] as it represents New York's legislative acceptance of the invitation issued by *International Shoe Co. v. Washington*[3] to expand the jurisdictional basis of the New York courts. Prior to the new notion of "minimum contacts" as expressed in *International Shoe*,[4] jurisdiction could be maintained over a foreign corporation[5] only if it was doing business within the state, "not casually or occasionally, but with a fair measure of permanence and continuity."[6] Under the "doing business" test,[7] causes of action can be maintained within the forum, even though the cause was unrelated to acts committed within the state.[8]

Under CPLR section 302, the New York courts may exercise personal jurisdiction over any non-domiciliary, who, within the state, transacts any business,[9] or commits a tortious act,[10] or owns, uses or possesses real property,[11] as to a cause of action arising from such acts. Although New York has previously relied upon "minimum contact" statutes in special situations,[12] CPLR

1. N.Y. Sess. Law 1962, ch. 308, § 302, approved by the Governor April 4, 1962. It provides, in part:

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis for jurisdiction. A court *may* exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action *arising from* any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through his agent, he:

1. *transacts any business within the state*; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. owns, uses, or possesses any real property situated within the state. (Emphasis added.)

2. See McLaughlin, *Civil Practice*, 15 Syracuse L. Rev. 381, 398 (1963); 1 Weinstein, Korn & Miller, New York Civil Practice § 302.01 (1963); Homburger, Book Review, 112 U. Pa. L. Rev. 1222, 1223 (1964).

3. 326 U.S. 310 (1945) (dicta). The concept of "minimum contact" was explicitly upheld in McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

4. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

5. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

6. *Id.* at 267, 115 N.E. at 917.

7. The doing business test is based on a fictional "presence" of the foreign corporation.

8. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

9. CPLR § 302(a)(1). See note 1 *supra.*

10. CPLR § 302(a)(2). See note 1 *supra.*

11. CPLR § 302(a)(3). See note 1 *supra.* Real property also includes chattels real. CPLR § 105(p).

12. Often called "long arm" or "single act" statutes. *E.g.*, N.Y. Workmen's Comp. Law § 150-a, N.Y. Ins. Law § 59-a, N.Y. Bus. Corp. Law § 307(a), N.Y. Vehicle and Traffic Law § 253(1), N.Y. Gen. Bus. Law §§ 352-b, 250. The conceptual approach used was that of "implied consent." Such statutes are in reality "minimum contact" statutes. CPLR § 302 is a recognition of the constitutional power of the state to obtain jurisdiction over a non-domiciliary defendant without his consent; see Totero v. World Telegram Corp., 41 Misc. 2d 594, 596-97, 245 N.Y.S.2d 870, 873 (Sup. Ct. 1963).

section 302 represents the first statutory provision of a general nature.[13] The New York law is modeled after the Illinois statute,[14] and the New York courts have taken some advantage of the considerable body of Illinois case law that has developed.

The central and most frequently litigated question, as revealed by the first seventeen months of case law, has been: what type of act or acts constitute a transaction of business sufficient to sustain personal jurisdiction over a non-domiciliary? It is the purpose of this note to survey and analyze the emerging case law, and to attempt to articulate tests and trends as indicated by these decisions. Four topics will be dealt with to shed light upon the "transacts any business" clause: (1) the constitutional requirements for minimum contact jurisdiction, as revealed by the leading federal cases, (2) the interpretation of CPLR section 302 in general, (3) the experience of the New York courts in interpreting the "transacts any business" clause, and (4) some factors which will affect the plaintiff's choice as to whether he should rely upon one, rather than another, of the newly created jurisdictional bases, or upon the traditional "doing business" test.

1. *Constitutional Standards*

The classic test of federal due process requires that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[15] The Supreme Court has expanded this formulation, however, in an attempt to articulate and emphasize the particular considerations implicit in due process. In *International Shoe*,[16] the Court set forth the essential requirements that the defendant must have had "certain minimal contacts"[17] or "contacts, ties, or relations"[18] with the particular forum. However, single or isolated activities will not suffice to subject a non-domiciliary foreign corporation to suit on *unrelated* causes of action.[19] But, as to related causes of action, notions of fairness and substantial justice are not offended if the defendant must respond to suit within the forum, since the defendant has exercised the privilege of conducting activities within the state, and he enjoys the benefits and pro-

13. See statute, note 1 *supra*.

14. Ill. Rev. Stat. ch. 110, § 17 (1963). "This section [CPLR § 302 is] modeled upon section 17 of the Illinois Civil Practice Act which was effective on January 1, 1956. . . ." Advisory Comm. on Practice and Procedure, Second Prelim. Rep. 39 (1958).

15. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), quoting, in part, Millikin v. Meyer, 311 U.S. 457, 463 (1940).

16. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

17. *Id.* at 316 (dicta).

18. *Id.* at 319 (dicta). "[S]ingle or occasional acts . . . , because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the [defendant] liable to suit." *Id.* at 318 (dicta).

19. "[S]ingle or isolated items of activities in a state in the corporation's behalf are *not* enough to subject it to suit on causes *unconnected* with the activities there. *Id.* at 317 (dicta) (emphasis added).

tections of its laws.[20] In this connection "an estimate of inconveniences" resulting from a trial away from the defendant's home is relevant.[21]

Twelve years after *International Shoe*,[22] the Supreme Court, in *McGee v. International Life Insurance Co.*,[23] upheld minimum contact jurisdiction resting on a state statute which subjected a foreign corporation to personal jurisdiction on a cause of action arising from the delivery of an insurance contract to the insured within the state. The Court conceded that the suit would result in inconvenience to the insurer, "but certainly nothing which amounts to a denial of due process."[24] In the following term the Court made it clear, in *Hanson v. Denckla*,[25] that it had not altogether abandoned the traditional doctrine of territoriality.[26] It rejected the notion that jurisdictional basis could be created merely by finding "the 'center of gravity' of the controversy, or the most convenient location for litigation."[27] "The issue is personal jurisdiction, not choice of law."[28] The Court required as an "essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[29]

Perhaps the clearest federal court statement since *Hanson*[30] is found in the late Judge Clark's opinion in *Deveny v. Rheem Mfg. Co.*[31] He notes: "While Hanson affirms the necessity of a defendant's having 'minimal contacts' with the forum state, that case in no sense can be taken as increasing the requirements which the court found to be satisfied in McGee."[32] He restates the basic federal due process test as it has evolved: "If a foreign corporation voluntarily elects to act here, it should be answerable here and under our laws."[33] But in addition, he emphasizes the jurisdictional relevance of the *reasonable expectations* of the defendant: "The act by a foreign corporation which will subject it to [personal jurisdiction] must be one which the foreign corporation could know to have potential consequences in the [forum state]."[34] It is not clear whether this latter test was to apply only to tortious acts,[35] or whether the test was prescribed for

20. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
21. *Id.* at 317 (dicta).
22. 326 U.S. 310 (1945).
23. 355 U.S. 220 (1957).
24. *Id.* at 224.
25. 357 U.S. 235 (1958).
26. "In McGee the court noted the trend of expanding personal jurisdiction over non-residents. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 250-51.
27. *Id.* at 254.
28. *Id.* at 254.
29. *Id.* at 253.
30. Hanson v. Denckla, 357 U.S. 235 (1958).
31. 319 F.2d 124 (2d Cir. 1963).
32. *Id.* at 128.
33. *Id.* at 128.
34. *Id.* at 128.
35. The facts of the case are almost identical to those in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The court needed only to address itself to the "commits a tort" clause of the Vermont statute. See Vt. Stat. Ann. tit. 12, § 885 (1958).

single-act statutes in general, for Judge Clark continued: "Otherwise, the [Vermont] statute could not be rationalized on the ground that the foreign corporation's subjection to Vermont's laws is, in effect, its own doing."[36] Whether or not this additional criterion has been an unarticulated standard in the New York "transacts any business" cases, and some of the consequences that would develop if it were a test, will be dealt with in section 3 of this note.

2. *General Applicability*

There is no longer any question that the term non-domiciliary applies to a foreign corporation,[37] although a literal reading might have caused the courts to construe the statute otherwise.[38] It is also settled that the defendant's act, upon which jurisdiction is based, may precede the effective date[39] of the statute.[40] However, actions instituted prior to the effective date, cannot utilize CPLR section 302 provisions retroactively to validate a jurisdictionally defective service of process.[41] It is recognized that CPLR section 302 requires far less in

36. Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963).

37. Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Tristate Pipe Lines Corp. v. Sinclair Refining Co., 151 N.Y.L.J., April 13, 1964, p. 14, col. 2 (Sup. Ct. 1964); Viewlex, Inc. v. Molon Motor & Coil Corp., 151 N.Y.L.J., March 4, 1964, p. 17, col. 7 (Sup. Ct. 1964); Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963). This assures that no disparity between foreign corporations and individual non-domiciliaries would evolve by treating foreign corporations separately under N.Y. Bus. Corp. Law § 307 ("does any business"). N.Y. Bus. Corp. Law § 307 now represents only an additional method of service over foreign corporations.

38. The statute is phrased ". . . non-domiciliary, or his executor, or administrator. . . ." CPLR § 302(a). See note 1 *supra*. See generally 1 Weinstein, Korn & Miller, New York Civil Practice ¶ 302.05 (1963).

39. September 1, 1963.

40. Simonson v. International Bank, 14 N.Y.2d 281, 289-90, 200 N.E.2d 427, 431-32, 251 N.Y.S.2d 433, 439-40 (1964) (dicta); Singer v. Walker, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964); Tebedo v. Nye, 45 Misc. 2d 222, 256, N.Y.S.2d 235 (Sup. Ct. 1965); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964); O'Conner v. Wells, 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. 1964); Janklow v. Williams, 43 Misc. 2d 1053, 252 N.Y.S.2d 785 (Sup. Ct. 1964); Perlmutter v. Standard Roofing & Tinsmith Supply Co., 43 Misc. 2d 885, 252 N.Y.S.2d 583 (Sup. Ct. 1964); Lewis v. American Archives Ass'n, 43 Misc. 2d 721, 252 N.Y.S.2d 217 (Sup. Ct. 1964); Foy v. Triumph Sports Car, Inc., 151 N.Y.L.J., May 15, 1964, p. 16, col. 8 (Sup. Ct. 1964); Rubens v. Beaver State Operating Corp., 151 N.Y.L.J., June 1, 1964, p. 18, col. 7 (Sup. Ct. 1964); Peterson v. Van Auken, 43 Misc. 2d 162, 250 N.Y.S.2d 560 (Sup. Ct. 1964); Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964); Crosney v. Hadley Corp., 151 N.Y.L.J., Jan. 24, 1964, p. 13, col. 6 (Sup. Ct. 1964); Totero v. World Telegram Corp., 41 Misc., 2d 595, 245 N.Y.S.2d 870 (Sup. Ct. 1963); Patrick Ellam, Inc. v. Nieves, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963). The holding is implicit in Developers Small Business Inv. Corp. v. Puerto Rico Land & Dev. Corp., 42 Misc. 2d 23, 246 N.Y.S.2d 896 (Sup. Ct. 1964); William Rand, Inc. v. Joyas De Fantasia, S.A., 41 Misc. 2d 838, 246 N.Y.S.2d 778 (Sup. Ct. 1964); Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963).

The section is remedial in effect. It serves to give the plaintiff an additional forum and in no way enlarges the substantive liability of the defendant. The question of retroactivity turns upon legislative intent. See CPLR § 10003. Note, however, the curious "exception" for a defendant who could show "justifiable reliance on the prior law." Simonson v. International Bank, *supra* at 290, 200 N.E.2d at 432, 251 N.Y.S.2d at 440 (dicta), which caused a recent federal case to characterize the "New York law on this question [as] not yet entirely clear." Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 319 n.1 (2d Cir. 1964).

41. Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964); Utilities & Indus. Management Corp. v. Barton Distilling Co., 22 A.D.2d 767, 253

the way of contacts than under the traditional "doing business" test,[42] and that it neither supersedes nor limits prior case or statutory law permitting acquisition of personal jurisdiction over non-domiciliaries.[43] It is also settled that dismissal of an action for lack of jurisdiction under the older provisions does not prevent plaintiff from bringing the action anew under CPLR section 302,[44] providing his action is not otherwise barred.[45] Of course, the dismissal of a suit initiated *after* the effective date of the statute, for want of pleading the proper jurisdictional facts, may be without prejudice.[46] However, the courts may not grant leave to amend a pleading which lacks the proper jurisdictional facts.[47] It is clear that the wording "non-domiciliary" applies to a person who is a non-domiciliary at the time of service, even though he was a domiciliary at the time of committing the act.[48] Also, out-of-state plaintiffs may invoke CPLR section 302

N.Y.S.2d 690 (1st Dep't 1964). *But see* Compagnie de Saint Gobaire v. Carrady, 152 N.Y.L.J., Dec. 30, 1964, p. 15, col. 8 (Sup. Ct. 1964). Prior to the *Simonson* decision, the New York law was to the contrary. Developers Small Business Inv. Corp. v. Puerto Rico Land & Dev. Corp., *supra* note 40; William Rand, Inc. v. Joyas De Fantasia, *supra* note 40; Steele v. DeLeeuw, *supra* note 40; Muraco v. Ferentino, *supra* note 40, at 105-06, 247 N.Y.S.2d at 600 (dicta); Patrick Ellam, Inc. v. Nieves, *supra* note 40, at 188, 245 N.Y.S.2d at 547 (dicta) which appear to have followed comments in 1 Weinstein, Korn & Miller, New York Civil Practice ¶ 302.04 (1963) and the leading Illinois case: Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (*held:* Illinois statute could be applied retroactively to a cause of action instituted prior to the enactment date of the statute); see also United States v. First Nat'l City Bank, 379 U.S. 897 (1965), holding that a temporary injunction issued on October 31, 1962 was valid under the provisions of CPLR § 302, although the lower federal court in granting the injunction could not be said to have had "probable jurisdiction" at that time. The Court distinguished the *Simonson* case on the grounds that, in the instant case, defendant had not been served, and therefore any action on the merits would be a further proceeding within the meaning of CPLR § 10003.

42. *E.g.*, See Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 253 N.Y.S.2d 215 (1st Dep't 1964); Nexsen v. Ira Haupt, 44 Misc. 2d 629, 254 N.Y.S.2d 637 (Sup. Ct. 1964); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964); Janklow v. Williams, 43 Misc. 2d 1053, 252 N.Y.S.2d 785 (Sup. Ct. 1964); Lewis v. American Archives Ass'n, 43 Misc. 2d 721, 252 N.Y.S.2d 217 (Sup. Ct. 1964); Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. 1964); Developers Small Business Inv. Corp. v. Puerto Rico Land & Dev. Corp., 42 Misc. 2d 23, 246 N.Y.S.2d 896 (Sup. Ct. 1964); Irgang v. Pelton & Crane Co., 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. 1964); Jump v. Duplex Vending Corp., 41 Misc. 2d 950, 246 N.Y.S.2d 864 (Sup. Ct. 1964); Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963).

43. *E.g.*, Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 253 N.Y.S.2d 215 (1st Dep't 1964). CPLR § 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." The miscellaneous jurisdiction provisions in other New York codifications also remains in effect, for CPLR § 10001—the repealer statute—only repealed the Civil Practice Act, thereby defeating any argument addressed to repeal by indirection. See Advisory Comm'n on Prac. and Proc., Second Prelim. Rep. 38 (1958).

44. Singer v. Walker, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964); Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964).

45. *I.e.*, statute of limitations.

46. Lebensfeld v. Tuch, 43 Misc. 2d 919, 252 N.Y.S.2d 594 (Sup. Ct. 1964).

47. *Ibid.* Without jurisdiction the court cannot make any rulings affecting the parties.

48. O'Connor v. Wells, 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. 1964), "Any other construction would defeat the purpose of the statute by permitting a domiciliary to commit a tort here, remove himself beyond the boundaries of New York claiming a change of domicile and thus avoid the jurisdiction of our state." *Id.* at 1076, 252 N.Y.S.2d at 863. Accord: Samoiloff v. Bary, 152 N.Y.L.J., July 24, 1964, p. 9, col. 1 (Sup. Ct. 1964). *But cf.* Kurland v. Chernobil, 260 N.Y. 254, 183 N.E. 380 (1932) interpreting "non-resident" in the New York non-resident motor vehicle statute, N.Y. Vehicle & Traffic Law § 52 (now N.Y.

to subject non-domiciliary defendants to the jurisdiction of the New York courts,[49] but the doctrine of *forum non conveniens* may be applied.[50] When deciding whether jurisdiction can be obtained over the legal representative of a decedent's estate for the purpose of CPLR section 302, the courts may take into account: (1) his acts in his representative capacity, or (2) the acts of the deceased, or (3) both the representative's acts and the decedent's acts combined.[51] Therefore, any reference to the "defendant's acts" in this note should be considered as inclusive of any acts by his agents, executors, or administrators.

Jurisdiction under CPLR section 302 cannot be maintained unless the cause of action *arose out of* the defendant's acts within the state.[52] All the cases that have denied jurisdiction because of a lack of nexus have involved tort actions where the defendant's tortious conduct, as well as the resultant damage, occurred outside the forum, and jurisdiction had been sought under CPLR section 302(a)(1) on the basis of defendant's business dealings within the state.[53] In the most recent case,[54] for example, defendant's agent sold motor coach tickets to the plaintiffs within the state. Shortly thereafter plaintiffs were injured while traveling in one of defendant's coaches from Las Vegas, Nevada, to Grand Canyon, Arizona. Assuming, *arguendo*, that the sale of tickets was a transaction of business, the court held that plaintiffs' cause of action in tort did not arise from the sale.[55]

3. *Transacts Any Business*

By the very words "transacts any business," the legislature has apparently limited jurisdiction under this subsection to transactions of a commercial nature.[56] The limitation was recognized early in the judicial history of the statute, where it was held that an action brought to execute a separation agreement made in New York by a husband and wife was not a transaction of business.[57] All the

Vehicle & Traffic Law § 253), as meaning non-resident at the *time of the act*. It has been suggested that CPLR § 302 be amended to expressly include a domiciliary who commits one of the enumerated acts and later moves to another state. McLaughlin, Practice Commentary on CPLR § 302, 7B McKinney's Consol. Laws of N.Y. Anno., § 302 at 22 (Supp. 1964).

49. See Collins v. American Legion, 152 N.Y.L.J., Dec. 18, 1964, p. 14, col. 8 (Sup. Ct. 1964); Michels v. McCrory Corp., 44 Misc. 2d 212, 253 N.Y.S.2d 485 (Sup. Ct. 1964) (The real parties in interest were both non-domiciliaries at the time of service).

50. See cases cited note 49 *supra*.

51. Nexsen v. Ira Haupt & Co., 44 Misc. 2d 629, 254 N.Y.S.2d 637 (Sup. Ct. 1964). See also Johnson v. Jay, 45 Misc. 2d 101, 255 N.Y.S.2d 705 (Sup. Ct. 1965).

52. "arising from". CPLR § 302(a). See note 1 *supra*.

53. *E.g.*, Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964); Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 253 N.Y.S.2d 215 (1st Dep't 1964); Curran v. Rouse Transp. Corp., 42 Misc. 2d 1055, 249 N.Y.S.2d 718 (Sup. Ct. 1964).

54. Gelfand v. Tanner Motor Tours, Ltd., *supra* note 53.

55. *Id.* at 321-22. *But see* Olavarria & Co. v. Marina Nicaraguense, 36 F.R.D. 270 (S.D.N.Y. 1964), involving a contract for shipment of *goods* made in New York.

56. See Weinstein, Korn & Miller, New York Civil Practice ¶ 302.01 (1963); Homburger, Book Review, 112 U. Pa. L. Rev. 1222, 1227 (1964).

57. Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. 1964). ". . . this court is not persuaded that the word 'business' as used in section 302 can be construed to encompass the execution of a separation agreement, but, rather, that the intendment and contemplation of the verbiage was in respect of transactions being a business—a commercial

cases decided thus far seem to require the commission of some *physical* act within the state by the defendant, his agent, executor, or administrator in order to establish jurisdiction under the "transacts any business" clause;[58] but in a few cases, the acts have indeed been minimal.[59] Where there is no physical activity, jurisdiction has been denied, although the reason given may have been a totally different one. For instance, the rationale, ". . . the time and *place* of the making of a contract is established when the last act necessary for its formulation is done, and at the place where that final act is done . . ."[60] has been used to deny jurisdiction where the defendant's signing was last in time and it occurred outside the state.[61] But the same rationale cannot be used in plaintiff's favor, where plaintiff's signature was the final act, and his signing alone occurred in New York state.[62]

What Acts Are Sufficient?

It is generally assumed that the making of a contract by both parties in New York, without other facts, will constitute a transaction of business.[63] But in the cases that stand for this proposition, additional facts were present that may well have affected the decision of the court,[64] *e.g.*, substantial performance by one of the parties in New York,[65] or anticipated performance of the contract

aspect." *Id.* at 475, 248 N.Y.S.2d at 262 (1964); *accord*, Antique & Period Furniture Co. v. First Nat'l City Bank, 151 N.Y.L.J., April 15, 1964, p. 15, col. 4 (Sup. Ct. 1964), where the defendant was a non-resident legatee to a will probated in New York, and appointed a New York lawyer to represent him, *held*, not a transaction of a commercial nature.

58. The requirement of a physical act within the forum is not an essential when dealing with CPLR § 302(a)(2)—the "tortious act" clause. *E.g.*, Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964), where the defendant's acts occurred outside the state but the damage occurred within the forum. Nor would a physical act be an absolute requirement when applying CPLR § 302(a)(3), as ownership of real property within the state connotes only a recognition of a legal relationship. In this regard due process is satisfied by "minimal contacts." See International Shoe v. Washington, 326 U.S. 310, 316 (1945).

59. See Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. 1964), where a defendant hotel corporation advertised in New York by way of newspapers and maintained a direct line telephone in New York City to facilitate reservations. Held: the acts constituted a transaction of business. *Contra*, Borges v. Pipher, 152 N.Y.L.J., Oct. 28, 1964, p. 22, col. 4 (Sup. Ct. 1964) (same facts).

60. Fremay, Inc. v. Modern Plastics Machinery Corp., 15 A.D.2d 235, 237, 222 N.Y.S.2d 694, 697 (1st Dep't 1961).

61. Hoard v. U.S. Paint, Lacquer, & Chemical Co., 44 Misc. 2d 72, 253 N.Y.S.2d 89 (Sup. Ct. 1964) (Contract was signed by plaintiff in New York, followed by defendant signing it in Missouri. Therefore, the court said, the contract was a Missouri contract and the defendant was not subject to the jurisdiction of the New York courts.)

62. Schnall v. Clearfield Cheese Co., 151 N.Y.L.J., June 15, 1964, p. 14, col. 4 (Sup. Ct. 1964); Atlas-Mitford, Inc. v. Edison Conn. Stores, 151 N.Y.L.J., March 20, 1964, p. 13, col. 8 (Sup. Ct. 1964). These two cases and Hoard v. U.S. Paint, Lacquer, & Chemical Co., *supra* note 61, can be reconciled on the grounds that no acts were done by the defendant in New York.

63. Multiplate Glass Corp. v. Florida Glass & Mirror Co., 152 N.Y.L.J., Dec. 30, 1964, p. 18, col. 5 (Sup. Ct. 1964); Earl S. Peed Organization v. Gray, 151 N.Y.L.J., April 29, 1964, p. 16, col. 2 (Sup. Ct. 1964); *In re* Brubard Corp., 151 N.Y.L.J., March 6, 1964, p. 14, col. 7 (Sup. Ct. 1964); Crosney v. Hadley Corp., 151 N.Y.L.J., Jan. 24, 1964, p. 13, col. 6 (Sup. Ct. 1964); Patrick Ellam, Inc. v. Nieves, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963); Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963).

64. Cases cited note 63 *supra*.

65. *E.g.*, Multiplate Glass Corp. v. Florida Glass & Mirror Co., 152 N.Y.L.J., Dec. 30,

in New York.[66] The importance of such additional facts may be seen by illustration. Suppose that a New York architect has engaged in extensive negotiations with a California doctor to build a new home. All the negotiations have taken place in California, where the home is to be built. The parties take advantage of the doctor's pleasure trip east, in order to sign the contract, during his visit to the World's Fair. Shortly after the house is completed, the foundation collapses. The doctor refuses to pay and he is sued in New York. It is submitted that the courts might well hold that the defendant's act of signing was not sufficient to constitute a transaction of business; although they might do so on varying grounds, *e.g.*, the mere signing of a contract is not sufficient, or the agreement had already been made outside New York, and the New York contract was only a formalized memorial, or the business transacted was accidental or fortuitous and not within the purview of the statute. Regardless of the reasons given, the courts would appear to be taking into account the reasonable expectations of the defendant. To elucidate this point, assume a change in the facts. Instead of a California house, the contract calls for a house in New York, as a gift to the doctor's nephew. Although the contract is now to be performed in New York by the plaintiff, the defendant has committed no additional acts in the state. But this change in facts may lead to a change in the result, because now the same act takes on a new significance. The differing results, as suggested, turn on the attendant facts and circumstances, which affect the defendant's *reasonable expectations*.[67]

Seemingly all courts would agree that the New York courts would not refuse jurisdiction when a contract was: (1) consummated in New York by both parties, and (2) performed in New York by either of the parties.[68] But, again, what if the contract clearly states that the plaintiff is to perform the contract in his Illinois plant? Should the New York courts acquire jurisdiction if the plaintiff later decides that he will perform it at his plant in Buffalo? Under the

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1964, p. 18, col. 5 (Sup. Ct. 1964); Patrick Ellam, Inc. v. Nieves, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963).

66. *E.g.*, Earl S. Peed Organization v. Gray, 151 N.Y.L.J., April 29, 1964, p. 16, col. 2 (Sup. Ct. 1964); Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963).

67. See Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963), and notes 31-36 and accompanying text *supra*. The New York courts appear to be concerned with the defendant's reasonable expectations, as revealed by their treatment of the additional factors or circumstances in their opinions. *E.g.*, in Lewis v. American Archives Ass'n, 43 Misc. 2d 721, 252 N.Y.S.2d 217 (Sup. Ct. 1964), the court found jurisdiction over a Delaware corporation where its vice-president executed a contract in New York with a domiciliary lawyer who was to assist in local litigation on behalf of the corporation. The court, however, treated additional elements—that the vice-president came back into the state to attend the pretrial examinations that were conducted by the plaintiff—as significant factors. See also the treatment of additional circumstances in Janklow v. Williams, 43 Misc. 2d 1053, 252 N.Y.S.2d 785 (Sup. Ct. 1964); Wall v. Abraham & Straus Corp., 151 N.Y.L.J., May 14, 1964, p. 18, col. 8 (Sup. Ct. 1964); Appeal Printing Co. v. Manchester Ins. & Inv. Corp., 151 N.Y.L.J., Feb. 28, 1964, p. 16, col. 3 (Sup. Ct. 1964).

68. "Certainly where a contract is made in this state and a cause of action arises out of such contract, the consummation of such contract in New York constitutes the transaction of business or the minimum contacts necessary to invoke personal jurisdiction." Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 634-35, 248 N.Y.S.2d 494, 497 (Sup. Ct. 1964).

proposed analysis, if the defendant's reasonable expectations were considered, jurisdiction should be denied, for defendant's *reasonable expectations* would be measured at the time he consummated the contract in New York state.

Of course, there may be facts and circumstances other than performance of the contract in New York state which would tend to support the courts' jurisdiction over a non-domiciliary. For instance, when the defendant commits other acts in New York, in addition to consummating the contract in the state, these acts taken together may give rise to reasonable expectations on the part of the defendant that he will be subjected to suit in New York. A recent New York case[69] involved a resident father who sent his child to a Pennsylvania camp. The child was injured in a fall from a horse, and a suit in negligence and for breach of contract[70] was commenced. New York was held to be a proper forum as: (1) both parties entered into the contract in New York, (2) the defendant was paid in full in New York, and (3) the defendant transported the child from New York to the Pennsylvania camp.[71]

It is not even necessary for the non-domiciliary defendant to consummate a contract in New York, in order for the New York courts to obtain jurisdiction over his person. For instance, where a defendant hotel corporation solicited business in New York through newspaper advertisements, and plaintiff confirmed her reservations via a direct line telephone installed by the defendant in New York, the New Jersey hotel was held to have transacted business within the meaning of the statute,[72] although the suit was founded upon a tort that was committed in New Jersey.[73] Also, where a non-domiciliary defendant packed and delivered goods to a New York state concern, and a resident workman was

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69. Janklow v. Williams, 43 Misc. 2d 1053, 252 N.Y.S.2d 785 (Sup. Ct. 1964).

70. The owner of the camp warranted that the child would learn to ride under the control and supervision of the defendant and be returned in good physical health. *Id.* at 1055, 252 N.Y.S. at 787.

71. Janklow v. Williams, 43 Misc. 2d 1053, 1055, 252 N.Y.S.2d 785, 787 (Sup. Ct. 1964). The opinion also suggests that negotiations between the parties took place in New York. *Id.* at 1055, 252 N.Y.S. at 787.

72. Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. 1964). *Contra,* Borges v. Pipher, 152 N.Y.L.J., Oct. 28, 1964, p. 22, col. 4 (Sup. Ct. 1964) (same facts). See also Abraham v. Hotel Fontainbleu, 151 N.Y.L.J., May 22, 1964, p. 14, col. 7 (Sup. Ct. 1964) (same facts but, in addition, the defendant maintained a staff in New York to answer questions, and make reservations. *Held*: defendant's acts constituted a transaction of business).

73. Greenberg v. R.S.P. Realty Corp., *supra* note 72. In regard to the requirement that the cause of action must arise from the defendant's acts within the state, *compare Greenberg* and Abraham v. Hotel Fontainbleu, *supra* note 72 *with* cases cited note 53 *supra.* In Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964), upon analogous facts, the court, by implication, refused to follow *Greenberg* and *Abraham* on this ground. "We assume for the sake of argument that the sale of the tickets by the defendants . . . was a business transaction within New York. We cannot, however, agree that plaintiffs' cause of action in tort arose from that sale. . . . It cannot even be said that the duty of care owed by defendants to the plaintiffs arose in New York, for that duty did not finally arise until plaintiffs boarded defendants' bus in Las Vegas. We are referred to no *appellate court* cases nor has our own research disclosed any, which uphold jurisdiction over a personal injury claim on anything like such slender grounds." Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321-22 (2d Cir. 1964) (emphasis added).

injured in the process of unpacking, the New York courts could entertain the suit on the grounds that the defendant had transacted business within the state.[74] In another lower court decision, where there was a dispute as to whether or not there was a contract in fact between the parties, the court held it had jurisdiction on the basis of agents' inspections, negotiations, and other activities in furtherance of the alleged construction agreement.[75] In a leading Appellate Division case,[76] it was decided that the defendant was subject to the jurisdiction of the New York courts, even though the original contract was made in Illinois, and manufacture and delivery of goods occurred in that state. The key facts, subjecting the defendant to jurisdiction, were that the defendant: (1) conducted extensive negotiations in New York with the plaintiff, (2) entered into a supplemental agreement in New York with plaintiff, and (3) sent responsible officials of defendant corporation to participate in the testing and installation of the goods within the forum.[77] It has also been held that when the non-domiciliary defendant ships goods into the state, and later dispatches employees to rectify difficulties that have arisen with those goods, the acts are sufficient to maintain jurisdiction.[78]

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74. Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964). The court also held that jurisdiction could be maintained under the "tortious act" clause. *Accord*, Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Fornabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964). The holding with regard to "transacts any business" would appear to be a questionable one, and may not be followed; see Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. 1964).

75. Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964). Two agents of the foreign corporation, each on separate occasions, spent several days in New York in furtherance of the alleged contract. The mechanics of the opinion are open to some criticism. Judge Jasen refused to take into account the alleged New York contract solely because its existence was controverted by the defendant. A preferable approach might have been to hold a preliminary hearing and make a determination that in no way would be res judicata on the merits of the case. See Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (requiring a factual finding as to whether a tortious act was committed within the state); *cf.* United States v. Montreal Trust Co., 35 F.R.D. 216 (D.C.N.Y. 1964) (whether or not jurisdictional basis existed under CPLR § 302(a)(1) was a question of fact, which would not be decided upon the basis of affidavits submitted). There is one problem which is raised by both approaches, however. Since the action is on the contract, what is the effect on the nexus requirement, when there is no positive preliminary finding that there was a contract in fact between the parties? Although the defendant's acts were sufficient to constitute a transaction of business within the state, can the breach of contract action be said to have arisen out of the acts of negotiation and investigation? Conceptually, the answer would seem to be no, but, it is submitted that a court should be justified in maintaining jurisdiction, under such circumstances, if there is *any* evidence as to the existence of a contract, consummated in New York state or elsewhere.

76. Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, Inc., 21 A.D.2d 474, 251 N.Y.S.2d 740 (1st Dep't 1964).

77. *Ibid.* Although the original contract stipulated that New York law was applicable, such was not interpreted to be consent by the defendant to submit to the jurisdiction of the New York courts, but, the court said, the stipulation could be used as ". . . some indication that the agreement was the outgrowth of contacts within the state. . . ." *Id.* at 477-78, 251 N.Y.S.2d at 743.

78. Viewlex, Inc. v. Molon Motor & Coil Corp., 151 N.Y.L.J., March 4, 1964, p. 17, col. 7 (Sup. Ct. 1964). There is dicta to the effect that shipment of goods *alone* would be insufficient. *But cf.* Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964) (see note 74, *supra*, and accompanying text).

What Acts Are Deemed Insufficient?

Certain acts committed by the non-domiciliary defendant within the state appear to be insufficient to subject him to jurisdiction, even though the defendant availed himself of New York business opportunities. One such case[79] involved a single delivery of materials by a third party defendant, pursuant to a contract executed in New York state by the plaintiff and the defendant-third party plaintiff. The court held, in effect, that the third party defendant's delivery was not a sufficient contact, and that even if the statute was satisfied, the contract was too tenuous to satisfy due process.[80] In another lower court case,[81] plaintiffs sought to hold the assignee of a contract to certain warranties concerning the quality of goods. Defendant's assignor, who was the original party to the contract, which was consummated in New York, had gone out of business following the shipment of the merchandise. The defendant's only acts were those of billing the plaintiffs in connection with the sale and of limited negotiations in New York in regard to the complaint surrounding the products which were sold; the court held that such acts satisfied neither the transaction of business clause nor the requirements of due process.[82]

It was decided in a recent federal court case[83] that pre-contract negotiations within the state are insufficient, by themselves, to sustain jurisdiction.[84] There, the defendant ordered goods from a New York dealer. Since the goods did not perform satisfactorily, the New York dealer instructed plaintiff, another New York state concern, to construct a prototype of the goods sold. As a result, defendant's president came to New York to inspect the samples, and to negotiate with the plaintiff in regard to specifications. Shortly thereafter, the contract between plaintiff and defendant was consummated, defendant's president signing the contract in New Jersey. The court, while holding that negotiations alone were insufficient,[85] suggested that the defendant's acts were additionally deficient to provide jurisdictional basis, for the acts were in no way solicitous, when viewed in light of the surrounding circumstances.[86] By implication, the opinion suggests that the commission of such non-solicitous acts would not give rise to *reasonable expectations* that the defendant would, through such acts, be subjected to the jurisdiction of the New York courts.[87]

79. Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. 1964).

80. *Ibid.*

81. Perlmutter v. Standard Roofing & Tinsmith Supply Co., 43 Misc. 2d 885, 252 N.Y.S.2d 583 (Sup. Ct. 1964).

82. *Ibid.*

83. Bos-Hatten, Inc. v. Wesley Associates, Inc., Civil No. 10930, W.D.N.Y., Nov. 23, 1964.

84. *But see* Safety Window Hardware Corp. v. Transcontinental Indus. Inc., 151 N.Y.L.J., May 27, 1964, p. 16, col. 5 (Sup. Ct. 1964) (contract consummated outside New York, but negotiations leading up to the contract were sufficient).

85. Bos-Hatten, Inc. v. Wesley Associates, Inc., Civil No. 10930, W.D.N.Y., Nov. 23, 1964 at 6.

86. "Having purchased unsatisfactory goods from a New York seller, a foreign corporation should not become amenable merely because its officers or agents enter New York to protest and negotiate." *Id.* at 5.

87. See Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, Inc., 21 A.D.2d 474,

In addition, the showing of goods in New York alone, would appear to be too insufficient a contact to subject the non-domiciliary defendant to jurisdiction. In a lower court case,[88] where defendant had shown his dog in at least one dog show in Madison Square Garden, and plaintiff had thereafter purchased the dog from defendant,[89] the court held that the one or more "showings" were insufficient for a jurisdictional basis.[90] Although the case does not deal with a showing of goods *for the purposes of sale*, it is doubtful that such a change in facts would lead to a change in result, as the act of showing goods, *alone*, would appear to be too minimal. If this is true, *a fortiori*, mere investigations or solicitations, would not, by themselves, constitute a transaction of business within the state, under any imaginable circumstances.

A combination of any of the acts enumerated above, however, may rise to the level of transacting "any business" even though the contract is not consummated in New York by both of the parties.[91] But the test is not merely quantitative and mechanical. Whether or not there is a transaction of business depends upon the quality and nature[92] of the collective acts, and upon the circumstances surrounding the acts, as they relate to the defendant's *reasonable expectations*.[93] Thus, acts other than those from which a cause of action arises may assume jurisdictional significance even though such acts would not constitute "doing business" under the traditional pre-CPLR test.

4. *Relation of "Transacts Any Business" to Other Jurisdictional Concepts*

Although "transacts any business" represents a great expansion of the jurisdictional power of the New York courts,[94] it should be recognized as only one of the jurisdictional tools now available. For instance, if the cause of action arises only from defendant's acts committed outside the state, jurisdiction will be denied under CPLR section 302(a)(1),[95] but the defendant, if a foreign cor-

251 N.Y.S.2d 740 (1st Dep't 1964), commenting on National Gas v. A.B. Electrolux, 270 F.2d 472 (7th Cir. 1959) (*held*: negotiations and solicitations were sufficient). "Notably, [such cases as *National Gas*] do not find the transaction of business merely on negotiations in plaintiff's state." Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, Inc., *supra* at 477, 251 N.Y.S.2d at 744. See also, Irgang v. Pelton & Crane, 42 Misc. 2d 70, 73-74, 247 N.Y.S.2d 743, 746-47 (Sup. Ct. 1963).

88. Hunter v. Calvaresi, 45 Misc. 2d 96, 256 N.Y.S.2d 356 (Sup. Ct. 1964).

89. The action was for breach of contract. All of the business dealings between the parties took place outside of the state.

90. Hunter v. Calvaresi, 45 Misc. 2d 96, 256 N.Y.S.2d 356 (Sup. Ct. 1964) (*held*, in the alternative, that no showing had been made by the plaintiff as to the "arising out of" requirement).

91. *E.g.*, see cases *supra* notes 72-78, and accompanying text.

92. See International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

93. See Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963).

94. *E.g.*, Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. 1964). ". . . considerably less in the way of contacts with New York is required for personal jurisdiction to attach in this State, than is required under the doing business concept." *Id.* at 183-84, 250 N.Y.S.2d at 462. See cases cited note 42 *supra*.

95. *Cf.* Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964); Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 253 N.Y.S.2d 215 (1st Dep't 1964); Curran v. Rouse Transp. Corp., 42 Misc. 2d 1055, 249 N.Y.S.2d 718 (Sup. Ct. 1964).

poration, may be "present"[96] within the state, and amenable to suit, because its other unrelated business activity within the state is continuous and systematic.[97] Significantly, the legislature did not intend to limit further judicial development of the "doing business" concept by enacting CPLR section 301,[98] and this spirit has been reflected in recent judicial decisions.[99]

CPLR section 302(a)(2)[100] has certain advantages over "transacting any business" as revealed by the New York cases to date. It now appears to be fairly well settled that the phrase "commits a tortious act within the state" can be used to obtain jurisdiction over a non-domiciliary though he commits *no physical acts* within the state,[101] and that it may be sufficient to show that the "foreseeable" harm was done within the forum even though it arose from the defendant's wrongful actions committed outside the state,[102] or from his wrongful inaction.[103]

In addition, an act may be committed by the defendant within the state which is sufficient to constitute a tortious act, but the same act may be insufficient to constitute a transaction of business. For example, where a defendant

96. "Doing business" within the state constitutes "presence."

97. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

98. CPLR § 301: "A court may exercise such jurisdiction over persons, property, or status as *might* have been exercised heretofore." (Emphasis added.)

99. "The words 'as might have been exercised heretofore' [in CPLR § 301] 'permits the courts to develop prior concepts used in New York without the limitations of statutory language'." Bryant v. Finnish Nat'l Airline, 22 A.D.2d 16, 17-18, 253 N.Y.S.2d 215, 217 (1st Dep't 1964) (dicta), quoting in part Weinstein, Korn & Miller, New York Civil Practice ¶ 301.10 (1963).

100. The "tortious act" clause. See statute, *supra* note 1.

101. See Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Fornabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964); *accord*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). "Though the basic acts of negligence took place outside the forum and the injury occurred here, the fact that such an injury was reasonably foreeable is sufficient to satisfy the basic requirement of due process." Ellis v. Newton Paper Co., 44 Misc. 2d 134, 135, 253 N.Y.S.2d 47, 49 (Sup. Ct. 1964). Nor is an act by the defendant, while physically present within the state, an absolute requirement for CPLR § 302(a)(3)—"owns, uses, or possesses real property . . ." as the word "owns" would indicate no more than a legal relationship to the property within the forum. However, "transacts any business" does appear to require an act by the defendant, or his agent, while physically within the state, and all the New York case law, thus far, would substantiate this. See also Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962). ". . . the performance of jurisdictional acts by a non-resident or his agent, while physically present in Illinois, is essential to the jurisdiction of the courts of this state [under "transacts any business"]." Kropp Forge Co. v. Jawitz, *supra* at 483, 186 N.E.2d 76, 79.

102. Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Fornabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964); *accord*, Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). "Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract." Singer v. Walker, 21 A.D.2d 285, 292, 250 N.Y.S.2d 216, 223 (1st Dep't 1964).

103. Platt Corp. v. Platt, 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964) (non-domiciliary director's failure to attend meetings of a domestic corporation subjected him to jurisdiction under CPLR § 302(a)(2), but the alternative attempt under CPLR § 302(a)(1) failed.

was alleged to have made certain fraudulent representations within the state as to the quality of goods prior to the execution of the contract outside the state, it was held that jurisdiction could be maintained under the tortious act paragraph,[104] but the same court denied the jurisdictional claim under CPLR section 302(a)(1).

On the other hand, CPLR section 302(a)(1) may sometimes be used more effectively than CPLR section 302(a)(2). The latter clause expressly excludes ". . . a cause of action for defamation of character arising from the act; . . ."[105] However, where an allegedly libelous article was sent to a New York syndicator-agent for release to newspapers nationwide, the non-domiciliary defendant was held to have transacted business within the state.[106] Also, certain breach of warranty actions may not constitute a "tortious act,"[107] and jurisdiction may be maintainable only because the defendant's acts within the state were sufficient to constitute a transaction of business.

While CPLR section 302(a)(3)[108] has had little judicial interpretation thus far,[109] it would appear that its main contribution would be in subjecting a non-domiciliary to in personam rather than quasi-in-rem jurisdiction.[110]

CONCLUSION

At the heart of the problem, it seems, lies the question: how far, within the limits set by due process requirements, does New York intend to go in implementing CPLR section 302?[111] Unfortunately, the policy decision must be made without clear legislative guidance. Neither the words of the statute, *e.g.*, "transacts any business," nor the scant legislative history[112] provide a ready

104. Hoard v. U.S. Paint, Lacquer, & Chemical Co., 44 Misc. 2d 72, 253 N.Y.S.2d 89 (Sup. Ct. 1964). *But see* Kramer v. Vogl, — A.D.2d —, 256 N.Y.S.2d 706 (2d Dep't 1965), *cf.*, Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. 1964) (parol evidence rule will not allow prior or contemporaneous evidence to be submitted that would add to, subtract from, vary or contradict an integrated writing between the parties).

105. CPLR § 302(a)(2). See statute *supra* note 1.

106. Totero v. World Telegram Corp., 41 Misc. 2d 595, 245 N.Y.S.2d 870 (Sup. Ct. 1963). *Accord*, Collins v. American Legion, 152 N.Y.L.J., Dec. 18, 1964, p. 14, col. 8 (Sup. Ct. 1964).

107. See Frank Angelilli Construction Co. v. Sullivan & Son, 45 Misc. 2d 171, 256 N.Y.S.2d 189 (Sup. Ct. 1965). ". . . [A] breach of warranty may result in merely loss of value of the goods, or in consequential damages occasioned by delay, or in actual physical harm to property or in personal injury . . . [and] policy considerations behind extending the field of personal jurisdiction [within CPLR § 302(a)(2)] show that a line should be drawn to include only those cases involving goods rendered inherently dangerous to person or property." *Id.* at 175-76, 256 N.Y.S.2d at 193; *accord*, Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964); Singer v. Walker, 21 A.D.2d 285, 291-92, 250 N.Y.S.2d 216, 223 (1st Dep't 1964) (dicta).

108. "Owns, uses or possesses real property within the state." See statute, *supra* note 1.

109. Tebedo v. Nye, 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. 1965); Abraham v. Hotel Fontainbleu, 151 N.Y.L.J., May 22, 1964, p. 14, col. 7 (Sup. Ct. 1964); Hempstead Medical Arts Co. v. Willie, 151 N.Y.L.J., Dec. 9, 1963, p. 18, col. 6 (Sup. Ct. 1963).

110. In a quasi-in-rem action, a judgment can only be enforced to the amount of the property involved.

111. See Thornton, *First Judicial Interpretation of the New York Single Act Statute*, 30 Brooklyn L. Rev. 285 (1964).

112. "This section, modeled upon section 17 of the Illinois Civil Practice Act which was

answer. While the question—"how far?"—has been raised in a number of cases, the courts often prefer to reserve judgment.[113] Two cases indicate that the statute was not designed to allow the courts to go to the "outer limits" of New York's constitutional power and, in fact, section 302 may be more limited in scope than the Illinois statute.[114] However, a recent federal court case[115] indicates that section 302 was designed to go to the full extent allowed by *International Shoe* and its progeny.[116] Critics of the statute have come to seemingly opposite conclusions.[117] In the absence of clear legislative directive, it would seem that the courts should go to the full extent of their constitutional power. One inherent legislative limitation in using the words "transacts any business" would be that they imply a commercial context. Such a limitation would be a valid legislative choice, as expanding commercial activity seems to be the ultimate justification for such a statute. Further, the word "transacts," especially when read in light of due process requirements, would imply voluntary dealings. But other than these limitations, the words "transacts any business" seem broadly permissive. Ultimately, therefore, it would appear that due process standards provide the only meaningful criteria for the courts in this area.

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effective on January 1, 1956, is designed to *take advantage* of the constitutional power of the state of New York to subject non-residents to personal jurisdiction when they commit acts within the state." Advisory Commission on Practice and Procedure, Second Prelim. Rep. 39 (1958) (emphasis added).

113. *E.g.*, Singer v. Walker, 21 A.D.2d 285, 292, 250 N.Y.S.2d 216, 223 (1st Dep't 1964).

114. Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. 1964) (by implication); Irgang v. Pelton & Crane Co., 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. 1963) (same judge). See also, Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. 1964).

115. Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964).

116. Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 320 (2d Cir. 1964). See also Janklow v. Williams, 43 Misc. 2d 1053, 1056, 252 N.Y.S.2d 785, 788 (Sup. Ct. 1964): "It becomes apparent . . . that the *courts* of this state intend to retain jurisdiction over such nondomiciliaries whenever possible." (emphasis added); Greenberg v. R.S.P. Realty Corp., 43 Misc. 2d 182, 184, 250 N.Y.S.2d 460, 462 (Sup. Ct. 1964) (The courts can go "to the extent permitted by due process.").

117. See Weinstein, Korn & Miller, New York Civil Practice ¶ 302.01 (1963); Note, 49 Cornell L.Q. 110 (1963). "With the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints." McLaughlin, Practice Commentary on CPLR § 302, 7B McKinney's Consol. Laws of N.Y. Anno., § 302, at 428 (1964).